

Chapter 42

Senior Officer Legal Orientation

DOMESTIC SUPPORT OPERATIONS

REFERENCES

1. 18 U.S.C. § 1385, Posse Comitatus Act.
2. 10 U.S.C. §§ 371-382, Chapter 18, Military Support For Civilian Law Enforcement Agencies.
3. 10 U.S.C. §§ 331-334, Chapter 15, Insurrections
4. 32 U.S.C. § 112, Drug Interdiction and Counter-Drug Activities
5. 42 U.S.C. § 5121, et seq., as amended, Stafford Act
6. 50 U.S.C. § 2311, Response to Threats of Terrorist Use of Weapons of Mass Destruction
7. National Defense Authorization Act for Fiscal Year 1991, P.L. 101-510, Section 1004, as amended, Additional Support for Counter-Drug Activities
8. National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201, Section 1031, as amended, Authority to Provide Additional Support for Counter-Drug Activities of Mexico
9. National Defense Authorization Act for Fiscal Year 1998, P.L. 105-85, Section 1033, Authority to provide Additional Support for Counter-Drug Activities of Peru and Colombia
10. DoDD 3025.15, *Military Assistance to Civil Authorities*, 18 February 1997
11. DoDD. 3025.1, *Military Support to Civil Authorities*, 15 January 1993.
12. DoD 3025.1M, *Manual for Civil Emergencies*, June 1994.
13. DoDD. 3025.12, *Military Assistance for Civil Disturbances*, 4 February 1994.
14. DoDD. 5525.5, *DoD Cooperation With Civilian Law Enforcement Officials* 15 January 1986, through Change 1, 20 December 1989.
15. DoDD 5525.10, *Using Military Working Dog Teams to Support Law Enforcement Agencies in Counterdrug Missions*, 17 September 1990
16. NGR 500-1/ ANGI 10-8101, *Military Support to Civil Authorities*, February 1996
17. NGB 500-2/ ANGI 10-801, *National Guard Counterdrug Support*, 31 March 2000
18. CJCS Instruction 3710.01, *Delegation of Authority for Approving Operational Support to Drug Law Enforcement Agencies and Counterdrug-Related Deployment of DoD Personnel*, 28 May 1993 (under revision).
19. AR 500-51, *Support to Civilian Law Enforcement*, 1 August 1983.
20. AR 700-131, *Loan and Lease of Army Material*, 1 September 1996
21. SECNAVINST 5820.7B, *Cooperation With Civilian Law Enforcement Officials*, 28 March 1988
22. OPNAVINST 3440.1C, *Navy Civil Emergency Management Program*, 10 March 1995
23. AFI 10-801, *Air Force Assistance to Civilian Law Enforcement Agencies*, 15 April 1994.
24. AFI 10-802, *Military Support to Civil Authorities*, 23 February 1994
25. AFI 31-202, *Military Working Dog Program*, 1 August 1999
26. DoD Civil Disturbance Plan GARDEN PLOT
27. FM 100-19, *Domestic Support Operations*, July 1993.
28. Office of the Defense Coordinator for Drug Enforcement Policy and Support Policy of 26 Jan 95, *Priorities, Policies, and Procedures for Department of Defense Counterdrug Support to Domestic Drug Law Enforcement Agencies*.
29. National Security Strategy for Homeland Security, Office of Homeland Security, July 2002.
30. Homeland Security Act of 2002, Pub. L. No. 107-296 (2002).

I. OBJECTIVES

- A. Become familiar with DoD's role overall in domestic operations.
- B. Become familiar with the Posse Comitatus Act.
- C. Become familiar with DoD's role in disasters and emergencies.
- D. Become familiar with DoD's role in civil disturbances.
- E. Become familiar with DoD's role in providing support to law enforcement.
- F. Become familiar with DoD's role in counterdrug support.

II. HOMELAND SECURITY

- A. Since September 11, 2001, the role of the military in domestic operations has changed drastically. Prior to September 11th, military involvement in domestic operations was almost exclusively in the area of civil support operations. Post-September 11th, the military's role has expanded to cover "homeland defense" and/or "homeland security" missions, somewhat undefined terms.
 - 1. The most recent Quadrennial Defense Review Report (September 30, 2001) "restores the defense of the United States as the Department's primary mission." How this national security mission interacts with the traditional framework for the civil support mission is unclear.
 - 2. "Homeland security (HLS)" is defined in The National Strategy for Homeland Security (July 2002) as "a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur." Clearly the focus is on acts of terrorism and responses thereto. The document does not break the mission of "homeland security" down further. However, the Vice Chairman of the Joint Chiefs of Staff testified to Congress that the DoD "homeland security" mission breaks down into two functions: homeland defense and civil support.

- a. “Homeland defense (HLD)” is not defined in the National Strategy for Homeland Security. However it is generally considered to consist of war-fighting missions led by the Department of Defense. Examples include combat air patrols and maritime defense operations.
 - b. “Civil support (CS)” is not defined in the National Strategy for Homeland Security. However it is generally considered to consist of missions where the DoD provides assistance or support to other lead federal or state agencies. Examples include disaster response, counterdrug support, and support to civilian law enforcement.
- 3. The challenge in today’s environment is determining which type of mission the military is being asked to perform. The type of mission, HLD or CS, dictates the applicable legal structure, to include: rules of engagement/ rules for use of force, applicability of statutory restrictions such as the Posse Comitatus Act, chain of command and authority levels, and funding sources.

B. Homeland Security Act of 2002

- 1. This Act establishes the Department of Homeland Security in the executive branch of the United States government and defines its primary missions and responsibilities. The primary missions of the department include preventing terrorist attacks within the United States, reducing the vulnerability of the United States to terrorism at home, and minimizing the damage and assisting in the recovery from any attacks that may occur. The Department’s primary responsibilities correspond to the five major functions established by the bill within the Department: information analysis and infrastructure protection; chemical, biological, radiological, nuclear, and related countermeasures; border and transportation security; emergency preparedness and response; and coordination with other parts of the federal government, with state and local governments, and with the private sector. These primary missions and responsibilities are not exhaustive, and the Department will continue to carry out other functions of the agencies it will absorb.

2. Implementation Guidance Regarding the Office of the Assistant Secretary of Defense for Homeland Defense (25 March 2003). Appoints an Assistant Secretary of Defense for Homeland Defense (ASD(HD)) whose principal duty is the overall supervision of the HLD activities of the DoD. The ASD(HD) serves as the DoD Domestic Crisis Manager. Secretary of the Army is therefore no longer the DoD executive agent under DoDD 3025.1, 3025.15, and 10 USC 2564. The functions and resources of the Office of the Director of Military Support (DOMS) are transferred to CJCS with policy oversight by ASD(HD).

III. POSSE COMITATUS ACT

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both. 18 U.S.C. § 1385.

A. History.

1. posse comitatus *po.si komitei.tAs, -tius*, [med. (Anglo) L., force of the county: see prec. and county.] ‘The force of the county’; the body of men above the age of fifteen in a county (exclusive of peers, clergymen, and infirm persons), whom the sheriff may summon or ‘raise’ to repress a riot or for other purposes; also, a body of men actually so raised and commanded by the sheriff. Oxford English Dictionary Online.
2. In the United States the military was used extensively as a posse comitatus to enforce various laws as diverse as the Fugitive Slave Law and the Reconstruction eras laws. Throughout time, the authority level necessary for local law enforcement to call on the military as a posse comitatus devolved down to the lowest level.
3. For several reasons (the Army’s increasingly vocal objection to “commandeering of its troops,” Southerners’ complaints that the Northern-based federal military was unfairly enforcing laws against them, and compromises made as a result of the most recent presidential election), Congress sought to terminate the prevalent use of federal soldiers in civilian law enforcement roles.

4. Congress therefore passed the PCA in 1878 as a rider to an Army appropriations act, limiting the circumstances under which the Army could be used as a posse comitatus to “execute the laws.”

B. To Whom the PCA Applies.

1. Active duty personnel in the Army and Air Force.
 - a. Most courts interpreting the Posse Comitatus Act have refused to extend its terms to the Navy and Marine Corps. (United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991); United States v. Roberts, 779 F.2d 565 (9th Cir. 1986), *cert. denied*, 479 U.S. 839 (1986); United States v. Mendoza-Cecelia, 736 F.2d. 1467 (11th Cir. 1992); United States v. Acosta-Cartegena, 128 F. Supp 2d. 69 (D.P.R. 2000)).
 - b. In 10 U.S.C. § 375, Congress directed SECDEF to promulgate regulations forbidding direct participation "by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity." SECDEF has done so in DoDD 5525.5. Therefore, the proscription has been extended by regulation to the Navy and Marine Corps. (See DoDD 5525.5, para. B(1), and enclosure 4, para C.). SECDEF and SECNAV may grant exceptions on a case-by-case basis. DoDD 5525.5, Encl. 4, para. C., SECNAVINST 5820.7b, para. 9c.
2. Reservists on active duty, active duty for training, or inactive duty for training.
3. National Guard personnel in Federal service (Title 10 status).
4. Civilian employees of DoD when under the direct command and control of a military officer. (DoDD 5525.5, encl. 4; AR 500-51, para. 3-2; SECNAVINST 5820.7B, para. 9b(3)).

C. The Whom the PCA does NOT Apply:

1. A member of a military service when off duty and acting in a private capacity. [A member is not acting in a private capacity when assistance to law enforcement officials is rendered under the direction or control of DoD authorities]. (DoDD 5525.5, Encl. 4; AR 500-51 para. 3.2; SECNAVINST 5820.7B, para. 9b(4); AFI 10-801).
2. A member of the National Guard when not in Federal Service.
3. A member of a Reserve Component when not on active duty, active duty for training, or inactive duty for training.
4. Members of the Coast Guard (14 U.S.C. § 2). Jackson v. Alaska, 572 P.2d 87 (Alaska 1977).
5. Members who are not a “part of the Army or Air Force.” In a 1971 Department of Justice opinion, then-Assistant Attorney General William Rehnquist addressed the assignment of Army personnel to the Department of Transportation to act as US Marshals. He determined that this was not a violation of the PCA as: (1) a statute (49 USC 1657) expressly authorized the detailing of military members to DoT; (2) under the statute the assigned members were not charged against statutory limits on grade or end strength; and (3) the members were not subject to direct or indirect command of their military department of any officer thereof. He determined, therefore, that they were DoT employees for the duration of the detail. Therefore they were not “part of the Army or Air Force.”

D. To What the PCA Applies.

1. When determining what actions are covered by the PCA, i.e., what constitutes “execut[ing] the law” under the statute, you must consider **both** directive and case law, as they are not identical. In fact, case law prohibits a much broader range of activities as “execut[ing] the law.” Some of these issues have been addressed in various service Judge Advocate General opinions, but some instances simply will require you to apply the court tests described.
2. By directive and regulation.
 - a. Prohibits direct law enforcement assistance, including:

- (1) Interdiction of a vehicle, vessel, aircraft, or other similar activity;
- (2) A search or seizure;
- (3) An arrest, apprehension, stop and frisk, or similar activity; and
- (4) Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators. DoDD 5525.5, Encl. 4, para. A.3.

3. By case law.

- a. Analytical framework. There are three separate tests courts apply to determine whether the use of military personnel has violated the PCA. See United States v. Kahn, 35 F.3d 426 (9th Cir. 1994); United States v. Hitchcock, 103 F.Supp 2d. 1226 (D. Haw. 1999).

- (1) FIRST TEST: whether the action of the military personnel was “active” or “passive.” United States v. Red Feather, 392 F. Supp. 916, at 921 (W.D.S.D 1975); United States v. Yunis, 681 F. Supp. 891, at 892 (D.D.C. 1988); United States v. Rasheed, 802 F.Supp. 312 (D. Haw. 1992).
- (2) SECOND TEST: whether use of the armed forces pervaded the activities of civilian law enforcement officials. United States v. Hartley, 678 F.2d 961, 978 (11th Cir. 1982) *cert. den.* 459 U.S. 1170 (1983); United States v. Hartley, 796 F.2d 112 (5th Cir. 1986); United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988); Hayes v. Hawes, 921 F.2d 100 (7th Cir. 1990);.
- (3) THIRD TEST: whether the military personnel subjected citizens to the exercise of military power which was:
 - (a) Regulatory (a power regulatory in nature is one which controls or directs);

- (b) Proscriptive (a power proscriptive in nature is one that prohibits or condemns); or
 - (c) Compulsory (a power compulsory in nature is one that exerts some coercive force). United States v. McArthur, 419 F. Supp. 186 (D.N.D. 1975); United States v. Casper, 541 F.2d 1274 (8th Cir. 1976), *cert. denied*, 30 U.S. 970 (1977). United States v. Yunis, 681 F. Supp. 891, at 895-6 (D.D.C. 1988); United States v. Kahn, 35 F.3d 426 (9th Cir. 1994).
- 4. Military Purpose Activities. The PCA does NOT apply to actions furthering a military or foreign affairs function of the United States. This is sometimes known as the “Military Purpose Doctrine.” The primary purpose must be to further a military interest. The civilians may receive an incidental benefit. DoDD 5525.5, Encl. 4, para. A.2.a. Such military purposes include:
 - (1) Investigations and other actions related to enforcement of the UCMJ. United States v. Thompson, 33 M.J. 218 (CMA 1991), *cert. denied*. 502 U.S. 1074 (1992).
 - (2) Investigations and other actions that are likely to result in administrative proceedings by DoD, regardless of whether there is a related civil or criminal proceeding.
 - (3) Investigations and other actions related to the commander’s inherent authority to maintain law and order on a military installation or facility. Harker v. State, 663 P.2d 932 (Alaska 1983); Anchorage v. King, 754 P.2d 283 (Alaska Ct. App. 1988); Eggleston v. Department of Revenue, 895 P.2d 1169 (Colo. App 1995). Civilians may be detained for an on-base violation long enough to determine whether the civilian authorities are interested in assuming the prosecution. Applewhite v. United States, 995 F.2d 997 (10th Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994).
 - (4) Protection of classified military information or equipment.

- (5) Protection of DoD personnel, DoD equipment, and official guests of the DoD. United States v. Chon, 210 F.3d 990 (9th Cir. 2000), *cert. denied*, 531 U.S. 910 (2000) (NCIS investigation of civilians undertaken for independent purpose of recovering military equipment was permissible).
- (6) Such other actions that are undertaken primarily for a military or foreign affairs purpose.

E. Where the PCA Applies. (Extraterritorial Effect of the PCA)

1. A 1989 DOJ Office of Legal Counsel opinion concluded that the Posse Comitatus Act does not have extraterritorial application. Memorandum, Off. Legal Counsel for General Brent Scowcroft, 3 Nov. 1989. This opinion also states the restrictions of 10 U.S.C. §§ 371 - 381, specifically 10 U.S.C. § 375, were also not intended to have extraterritorial effect. Id. at 21.
2. Some courts have also adopted the view that the Posse Comitatus Act imposes no restriction on use of U.S. armed forces abroad, noting that Congress intended to preclude military intervention in domestic affairs. United States v. Cotton, 471 F.2d 744 (9th Cir. 1973); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); United States v. Marcos, No. SSSS 87 Cr. 598, 1990 U.S. Dist. LEXIS 2049 (S.D.N.Y. Feb. 28, 1990). (Note: both Chandler and D'Aquino involved law enforcement in an area of military occupation.) But see, United States v. Kahn, 35 F.3d 426, 431 n. 6 (9th Cir. 1994) (In a case involving the applicability of the PCA to Navy activities in support of maritime interdiction of a drug-smuggling ship, the government maintained the PCA had no extraterritorial effect. While the court stated that issue had not been definitively resolved, it did state that 10 U.S.C. §§ 371-381 did "impose limits on the use of American armed forces abroad.")
3. Note, however, that DoD policy, as contained in DoDD 5525.5, which incorporates restrictions of 10 U.S.C. § 375, applies to all U.S. forces wherever they may be. Two weeks after the promulgation of the Barr memo, Secretary Cheney amended the Directive to read that, in the case of compelling and extraordinary circumstances, SECDEF may consider exceptions to the prohibition against direct military assistance with regard to military actions outside the territorial jurisdiction of the U.S.

F. What is the effect of violating the PCA.

1. Criminal Sanctions. 2 years imprisonment, fine, or both.
2. Note that to date, no direct action has been brought for violation of the PCA. The issue of the PCA has arisen instead as a “collateral” issue, whether as a defense to a charge by a criminal defendant, see Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002); United States v. Red Feather, 392 F. Supp. 916 (W.D.S.D. 1975); or in support of an argument for exclusion of evidence. Perhaps the question of more interest to the military member is what effect violation of the PCA would have on a state criminal case brought against a military member. For example, if a military member shot and killed a US civilian in the course of a HLS mission, if the state charged the member with murder and determined that the military member was “execut[ing] the law” (i.e. searching or seizing an individual) in violation of the PCA, would he therefore be acting outside the scope of his authority and lose protection from state prosecution.
3. Inability to Convict Offenders:
 - a. Exclusionary rule. In general, courts have not applied the exclusionary rule to cases in which the PCA was violated, using the following rationales:
 - (1) The PCA is itself a criminal statute, so there is no need to use the deterrent of the exclusionary rule. However, since there have been no prosecutions under the PCA, its deterrent effect is questionable. State v. Pattioay, 896 P.2d 911 (Hawaii 1995); Colorado v. Tyler, 854 P.2d 1366 (Colo. Ct. App. 1993), *rev’d on other grounds*, 874 P.2d 1037 (Colo. 1994); Taylor v. State, 645 P.2d 522 (Okla. 1982).
 - (2) The PCA is designed to protect the rights of all civilians, not the personal rights of the defendant. United States v. Walden, 490 F.2d 372 (4th Cir. 1974), *cert. denied* 416 U.S. 983 (1974).

- (3) Violations of the PCA are neither widespread nor repeated, so the remedy of the exclusionary rule is not needed. Court will apply the exclusionary rule when the need to deter future violations is demonstrated. United States v. Roberts, 779 F.2d 565 (9th Cir. 1986), *cert. denied* 479 U.S. 839 (1986); United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979); United States v. Thompson, 30 M.J. 570 (A.F.C.M.R. 1990).
 - b. Failure to prove an element of offense. Where the offense requires that law enforcement officials act lawfully, violation of the PCA would negate that element. United States v. Banks, 383 F. Supp. 368 (1974).
4. Dismissal of charges. Not likely to be considered an appropriate remedy. United States v. Rasheed, 802 F. Supp 312 (D. Hawaii 1992); United States v. Hitchcock, 103 F. Supp 2d. 1226 (D. Haw. 1999).
5. Civil Liability.
 - a. PCA violation as a private cause of action: No. PCA is a criminal statute; Congress did not intend to create a private cause of action. Robinson v. Overseas Military Sales Corp., 21 F. 3d 502, 511 (2nd Cir. 1994) *citing* Lamont v. Haig, 539 F. Supp. 552 (W.D.S.D. 1982).
 - b. PCA violation as a constitutional tort (“Bivens suit”): An evolving area. Applewhite v. United States Air Force, 995 F.2d. 997 (10th Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994)(finding PCA not violated, and conduct of military personnel did not otherwise violate 4th or 5th Amendment rights); Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986), *aff’d*, 485 U.S. 264 (1988)(finding a private right of action under the 4th Amendment).
 - c. Federal Tort Claims Act: Military personnel acting in violation of the PCA may not be found to be acting “within the scope of their employment,” and therefore may be subject to individual personal liability. Wrynn v. U.S., 200 F. Supp. 457 (E.D.N.Y. 1961).

IV. CIVIL SUPPORT

- A. Note that the memo referenced above, “Implementation Guidance Regarding the Office of the Assistant Secretary of Defense for Homeland Defense” directs the Assistant Secretary of Defense for Homeland Defense to “update and streamline” DoDD 3025.15, DoDD 3025.1, DoDD 3025.12, and “other related issuances.” There is no specific deadline for these changes noted. **Therefore before relying on the below information, you MUST check to ensure you have the most current version of the directive you are using.**
- B. DoD will cooperate with civil authorities, but the relationship is generally one of support—the civilian authorities retain primary responsibility.
- C. DoDD 3025.15
 - 1. Governs all DoD military assistance provided to civil authorities within the 50 States, District of Columbia, Puerto Rico, U.S. possessions and territories.
 - 2. Provides criteria against which all requests for support shall be evaluated. The directive addresses them to approval authorities, but commanders at all levels should use them in providing a recommendation up the chain of command.
 - a. Legality - compliance with the law.
 - b. Lethality - potential use of lethal force by or against DoD forces.
 - c. Risk - safety of DoD forces.
 - d. Cost - who pays, impact on DoD budget.
 - e. Appropriateness - whether the requested mission is in the interest of DoD to conduct.
 - f. Readiness - impact on DoD’s ability to perform its primary mission.

3. Approval Authority. The directive changes the approval authority, in certain cases, from that set forth in older directives, but the older directives have not been changed and are otherwise applicable.
 - a. SECDEF is the approval authority for:
 - (1) Civil Disturbances.
 - (2) Responses to acts of terrorism.
 - (3) Support that will result in a planned event with the potential for confrontation with specifically identified individuals or groups, or which will result in the use of lethal force.
4. When Combatant Command assigned forces are to be used, there must be coordination with the Chairman of the Joint Chiefs of Staff. CJCS will determine whether there is a significant issue requiring SECDEF approval, after coordination with the affected Combatant Command.
5. Immediate response authority in the local commander is not affected.

V. DISASTER & EMERGENCY RELIEF

A. References.

1. Law: Disaster Relief Statutes (Stafford Act), 42 U.S.C. §§ 5121, et seq.
2. DoD.
 - a. DoDD 3025.1, DoD 3025.1-M.
 - b. NGR 500-1/ANGI 10-8101.
3. Services.
 - a. AR 500-60.

- b. OPNAVINST 3440.1C.
 - c. AFI 10-802.
- B. Stafford Act. Provides four means by which the federal government may become involved in the relief effort:
 - 1. President may declare the area a major disaster (42 U.S.C. § 5170).
 - a. Follows a natural catastrophe.
 - b. Requires a request for the declaration from the governor.
 - c. State must have executed its own emergency plan and require supplemental help.
 - 2. President may declare the area an emergency (42 U.S.C. § 5191).
 - a. Same criteria as for a major disaster, except also requires that governor define the type and amount of federal aid required. Total federal assistance may not exceed \$5 million.
 - b. Operationally, no significant distinction between an emergency and a major disaster.
 - 3. President may send in DoD assets on an emergency basis to “preserve life and property.” 42 U.S.C. § 5170b(c).
 - a. Done before any Presidential declaration, but still requires a governor’s request.
 - b. Lasts only 10 days.
 - c. Used to clear debris and wreckage and to temporarily restore essential public facilities and services—very limited authority.

4. President may send in federal assets where an emergency occurs in an area over which the federal government exercises primary responsibility by virtue of the Constitution or federal statute. 42 U.S.C. § 5191(b).
 - a. Does not require a governor's request, although the statute directs consultation with the governor, if practicable.
 - b. Results in a Presidential declaration of an emergency.
 - c. President Clinton exercised this authority on April 19, 1995 in the case of the bombing of the Murrah Federal Building in Oklahoma City, OK.

C. The Federal Response.

1. The Federal Emergency Management Agency (FEMA) directs and coordinates the federal response on behalf of the President.
2. FEMA has prepared the *Federal Response Plan*, which defines 12 Emergency Support Functions (ESF's) for which certain federal agencies have either a primary or supporting role. DoD (Corps of Engineers) is the primary agency for ESF #3, Public Works and Engineering. DoD is a supporting agency for all others.
3. FEMA appoints a Federal Coordinating Officer (FCO), typically the senior FEMA official on-scene.
4. Because of the likelihood of DoD involvement, a Defense Coordinating Officer (DCO) is assigned to the FCO. The DCO, an O-6 or above, is generally drawn from the CONUSA headquarters. The DCO will be the FCO's single point of contact for DoD support.
5. The FCO issues Mission Assignments, defining the task and maximum reimbursement amount, to the federal agencies. Federal agencies, which exceed the reimbursement amount, or execute tasks not within the Mission Assignment, may not be reimbursed.

D. The DoD Response.

1. The Secretary of the Army is no longer the DoD Executive Agent for disaster relief operations. The duties and authorities associated with that assignment has been delegated to the new Assistant Secretary of Defense for Homeland Defense.
2. USNORTHCOM (CONUS, Puerto Rico, and the Virgin Islands) and USPACOM (Alaska, Hawaii, and Pacific possessions and territories) are responsible for developing disaster response plan and for the execution of those plans.

E. Immediate Response Authority.

1. Authorizes local military commanders to save lives, prevent human suffering, and mitigate great property damage in imminently serious conditions when time does not permit approval from higher headquarters.
2. Types of support authorized include:
 - a. Rescue, evacuation, and emergency treatment of casualties.
 - b. Emergency restoration of essential public services.
 - c. Emergency removal of debris and explosive ordnance.
 - d. Recovery and disposal of the dead.
3. This type of support is provided on a reimbursable basis, but assistance should not be denied because the requester is unable or unwilling to commit to reimbursement.
4. NOTE: This is a very limited authority, which should only be invoked, in bona fide emergencies. Contemporaneous coordination with higher headquarters should always occur in these scenarios, and in any other case potentially involving this type of assistance to civil authorities.

F. Disaster Support Involving Law Enforcement Activities.

1. The Stafford Act is **not** an exception to the Posse Comitatus Act. Therefore, any support that involves direct involvement in the enforcement of the civil law must undergo the PCA analysis discussed below. Typical areas of concern include:
 - a. Directing traffic.
 - b. Guarding supply depots.
 - c. Patrolling.
2. National Guard personnel, acting in their Title 32 (State) status should be the force of choice in these areas.
3. Law enforcement duties that involve military functions may be permissible (i.e., guarding a military supply depot).

VI. CIVIL DISTURBANCES

A. References.

1. Constitution: Article 4, Section 4: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.”
2. Law: Insurrections, 10 U.S.C. §§ 331-335.
3. DoD.
 - a. DoDD 3025.12.
 - b. DoD Civil Disturbance Plan GARDEN PLOT.

- B. The maintenance of law and order is primarily vested in state and local officials. Involvement of military forces will only be appropriate in extraordinary circumstances. Use of the military under these authorities to conduct law enforcement activities is a specific exception to the PCA. The probable order of employment of forces in response to a certain situation will be:
1. Local and state police.
 2. National Guard in their state status.
 3. Federal civil law enforcement officials.
 4. Federal military troops (to include National Guard called to active federal service).
- C. The insurrection statutes permit the President to use the armed forces in the following circumstances:
1. An insurrection within a State. The legislature or governor must request assistance from the President. § 331.
 2. A rebellion making it impracticable to enforce the laws of the United States (i.e., federal law) by the ordinary course of judicial proceedings. § 332.
 3. Any insurrection or domestic violence which:
 - a. opposes or obstructs federal law; or
 - b. hinders the execution of State law so that the people are deprived of their Constitutional rights, and the State is unable or unwilling to protect those rights. § 333.
- D. The Federal response.
1. The Attorney General coordinates all federal government activities relating to civil disturbances.

2. If the President decides to respond to the situation, he must first issue a proclamation to the insurgents, prepared by the Attorney General, directing them to disperse within a limited time. § 334. At the end of that time period, the President may issue an execute order directing the use of armed forces.
3. The Attorney General appoints a Senior Civilian Representative of the Attorney General (SCRAG) as his action agent.

E. The DoD Response.

1. SECDEF has reserved to himself the authority to approve support in response to civil disturbances (DoDD 3025.15).
2. Although the civilian authorities have the primary responsibility for response to civil disturbances, military forces shall remain under military command and control at all times.
3. GARDEN PLOT is the standing Operation Plan for response to civil disturbance. It is a comprehensive plan. Detailed Use of Force Policy / ROE is found in Appendix 1 and Appendix 8 to Annex C.

F. Emergency Employment of Military Forces.

1. Military forces shall not be used for civil disturbances unless specifically directed by the President (pursuant to 10 U.S.C. §§ 331-334), except in the following circumstances:
 - a. To prevent the loss of life or wanton destruction of property or to restore governmental functioning, in cases of civil disturbances, if the duly constituted authority local authorities are unable to control the situation and circumstances preclude obtaining prior Presidential authorization.
 - b. When duly constituted state or local authorities are unable or decline to provide adequate protection for Federal property or functions.
2. Note that this is limited authority.

- G. Other Considerations. Although employment under these authorities permits direct enforcement of the law by military forces, the military's role in law enforcement should be minimized as much as possible. Our role is to support the civilian authorities, not replace them.

VII. SUPPORT TO CIVILIAN LAW ENFORCEMENT

- A. Although the following activities can be considered law enforcement type activities, they do not violate the PCA as they do not involve use of military personnel to provide direct assistance. In addition, many of them are statutorily directed, and therefore could be considered an "exception" to the PCA.

- B. Loan of Equipment and Facilities.

- 1. References.

- a. Law: 10 U.S.C. § 372, § 374.

- b. DoD.

- (1) DoDD 5525.5, Enclosure 3.

- (2) NGB 500-1/ANGI 10-8101.

- c. Services.

- (1) AR 500-51, Chapter 2, Section 2.

- (2) SECNAVINST 5820.7B, para. 8.

- (3) AFI 10-801, Attachment 4.

- 2. With proper approval, DoD activities may make equipment (including associated supplies and spare parts), base facilities, or research facilities available to Federal, State, or local law enforcement officials for law enforcement purposes.

3. There must be no adverse impact on national security or military preparedness.
4. Approval authority.
 - a. SECDEF. Any requests for potentially lethal support, including loans of:
 - (1) Arms.
 - (2) Combat and tactical vehicles, vessels, or aircraft.
 - (3) Ammunition.
 - b. Army:
 - (1) HQDA (DALO-SMS). Non-lethal equipment in excess of 60 days. Installation Commander can approve all other equipment requests if loan/lease is for 60 days or less.
 - (2) HQDA (DAMO-ODS). Requests for use of installation or research facilities. AR 500-51, para. 2-5.
 - c. Navy & Marines: Assistant SECNAV (Manpower and Reserve Affairs) for non-lethal equipment for more than 60 days. All other requests may be approved as specified in SECNAVINST 5820.7B, para. 9e(3).
 - d. Air Force: Ass't SECAF for Manpower, Reserve Affairs, Installations, and Environment for all nondrug related requests. See AFI 10-801, Attachment 4.
 - e. National Guard: Loan of weapons, combat/tactical vehicles, vessels and aircraft require approval of the service secretary or their designee. Requests for loan/lease of NG equipment which require HQDA or HQAF approval will be reviewed by NGB. NGB 500-1/ANGI 10-8101, para. 3-1.

5. In addition to loan/lease authority, The National Defense Authorization Act of 1997 added a new section to Title 10. Section 2576a, "Excess Personal Property; Sale or Donation for law enforcement activities," permits DoD to provide excess personal property suitable for use in counter-drug and counter-terrorism activities to federal and state agencies.

- a. This includes authority to furnish small arms and ammunition.
- b. The Defense Logistic Agency manages this program as of 1 October 1995. Memorandum of the Secretary of Defense for the Under Secretary of Defense for Acquisition and Technology, 26 June 1995.
- c. The four Regional Logistics Support Offices (Buffalo, Miami, El Paso, Los Angeles) actually provide this excess property.

C. Expert Advice and Training.

1. References.

a. Law.

(1) 10 U.S.C. §§ 373, 375, 377.

(2) 50 U.S.C. §§ 2312, 2315.

b. DoD: DoDD 5525.5, Enclosure 4.

c. Services.

(1) AR 500-51, Chapter 3.

(2) SECNAVINST 5820.7B, para. 9.a.(4) and (5).

(3) AFI 10-801.

2. Military personnel may be used to train civilian law enforcement personnel in the use of equipment that we provide. Large scale or elaborate training programs are prohibited, as is regular or direct involvement of military personnel in activities that are fundamentally civilian law enforcement operations.
 - a. Note that the Deputy Secretary of Defense has provided policy guidance in this area, which limits the types of training US forces may provide. The policy is based on prudential concerns that advanced training could be misapplied or misused by CLEAs, resulting in death or injury to non-hostile persons. The memo permits basic military training such as basic marksmanship, patrolling, medical/combat lifesaver, mission planning, and survival skills. It prohibits what it terms “advance military training,” which is defined as “high intensity training which focuses on the tactics, techniques, and procedures (TTPs) required to apprehend, arrest, detain, search for, or seize a criminal suspect when the potential for a violent confrontation exists.” Examples of such training are sniper training, Military Operations in Urban Terrain (MOUT), Advanced MOUT, and Close Quarter Battle/Close Quarter Combat (CQB/CQC) training.
 - b. A single general exception exists to provide this advanced training at the US Army Military Police School. In addition, Commander, USSOCOM may approve this training, on an exceptional basis, by special operations forces personnel.
3. Military personnel may also be called upon to provide expert advice to civilian law enforcement personnel. However, regular or direct involvement in activities that are fundamentally civilian law enforcement operations is prohibited.
 - a. A specific example of this type of support is military working dog team support to civilian law enforcement. The dogs have been analogized to equipment and its handler provides expert advice. See DoDD 5525.10, Using Military Working Dog Teams to Support Law Enforcement Agencies in Counterdrug Missions, 17 Sept. 1990; Military Working Dog Program, AFI 31-202.

- b. Weapons of Mass Destruction. Congress has directed that DoD provide certain expert advice to federal, state, and local agencies with regard to weapons of mass destruction (WMD). This training is non-reimbursable because Congress has appropriated specific funds for these purposes.

- (1) 50 U.S.C. § 2312: Training in emergency response to the use or threat of use of WMD.
- (2) 50 U.S.C. § 2315: Program of testing and improving the response of civil agencies to biological and chemical emergencies. (Department of Energy runs the program for responses to nuclear emergencies.)

4. Approval Authority.

a. SECDEF.

- (1) Training or expert advice to law enforcement in which there is a potential for confrontation between the trained law enforcement and specifically identified civilian individuals or groups.
- (2) Assignments of 50 or more DoD personnel or a period of assignment of more than 30 days. The Assistance Secretary of Defense (Manpower, Reserve Affairs, and Logistics) is the approval authority for any other assignment.

b. Army. DOMS is the approval authority. AR 500-51, para. 3-1d.

c. Navy & Marines. The Secretary of the Navy is the approval authority. SECNAVINST 5820.7B, para. 9.e.

5. Funding. Support provided under these authorities are reimbursable, unless:

- a. The support is provided in the normal course of training or operations; or

- b. The support results in a substantially equivalent training value.

D. Sharing Information.

- a. References.

- (1) Law: 10 U.S.C. § 371

- (2) DoD: DoDD 5525.5, Enclosure 2.

- (3) Services.

- (a) AR 500-51, Chapter 2, Section 1.

- (b) SECNAVINST 5820.7B, para. 7.

- (c) AFI 10-801, Chapter 4.

- b. Any information collected in normal course of military operations may be provided to appropriate civilian law enforcement agencies.

- c. Collection must be compatible with military training and planning. To the maximum extent practicable, the needs of civilian law enforcement officials shall be taken into account in planning and execution of military training and operations. 10 U.S.C. § 371(b).

VIII. COUNTERDRUG SUPPORT

A. References.

- 1. Law.

- a. 10 U.S.C. § 124.

- b. 32 U.S.C. § 112.

- c. Section 1004, FY91 NDAA
- d. Section 1031, FY97 NDAA
- e. Section 1033, FY98 NDAA
- f. Public Law 107-107, Section 1021 (extends support for counter-drug activities through 2006.)

2. DoD.

- a. DEP&S Policy of 26 Jan 95.
- b. CJCSI 3710.01.
- c. NGB 500-2/ANGI 10-801.

B. General.

- 1. Counterdrug support operations have become an important activity within DoD. All DoD support is coordinated through the Office of the Defense Coordinator for Drug Enforcement Policy and Support (DEP&S), which is located within the Office of the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD (SO/LIC)).
- 2. What separates counterdrug support from most other areas of support is that it is non-reimbursable. For FY03, Congress appropriated nearly \$850 million for DoD counterdrug support. DEP&S channels that money to the providers of counterdrug support.

C. Detection and Monitoring.

- 1. 10 U.S.C. § 124 made DoD the lead federal agency for detection and monitoring (D&M) of aerial and maritime transit of illegal drugs into the United States. D&M is therefore a DoD mission.

- a. Although a mission, D&M is to be carried out in support of federal, state, and local law enforcement authorities.
 - b. Note that the statute does not extend to D&M missions covering land transit (i.e., the Mexican border).
 - c. Interception of vessels or aircraft is permissible outside the land area of the United States to identify and direct the vessel or aircraft to a location designated by the supported civilian authorities.
2. D&M missions involve airborne (AWACs, aerostats), seaborne (primarily USN vessels), and land-based radar (to include Remote Other The Horizon Radar (ROTHR)) sites.

D. National Guard.

1. 32 U.S.C. § 112 provides federal funding for National Guard counterdrug activities, to include pay, allowances, travel expenses, and operations and maintenance expenses.
2. The State must prepare a drug interdiction and counter-drug activities plan. DEP&S reviews each State's implementation plan and disburses funds.

E. Additional Support to Counterdrug Agencies.

1. General. Congress has given DoD additional authorities to support federal, state, local, and foreign which have counterdrug responsibilities. These are in addition to the authorities contained in 10 U.S.C. §§ 371-377 (discussed above). Congress has not chosen to codify these, however, so it is necessary to refer to the public laws instead. Many of these are reproduced in the notes following 10 U.S.C. § 374 in the annotated codes.
2. Section 1004.
 - a. Section 1004 is the primary authority used for counterdrug operations. The statute permits broad support to the following law enforcement agencies which have counterdrug responsibilities:

- (1) Federal, State, and Local.
- (2) Foreign, when requested by a federal counterdrug agency. (Typically the DEA or member of the State Department Country Team that has counterdrug responsibilities within the country.)

b. Types of support:

- (1) Maintenance and repair of equipment.
- (2) Transportation of personnel (U.S. & foreign), equipment, and supplies CONUS/OCONUS.
- (3) Establishment of bases of operations CONUS/OCONUS.
- (4) Training of law enforcement personnel, to include associated support and training expenses.
- (5) Detection and monitoring of air, sea, surface traffic outside the United States, and within 25 miles of the border if the detection occurred outside the United States.
- (6) Construction of roads, fences, and lighting along U.S. border.
- (7) Linguist and intelligence analyst services.
- (8) Aerial and ground reconnaissance.
- (9) Establishment of command, control, communication, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

c. These authorities are not exceptions to the Posse Comitatus Act. Any support provided must comply with the restrictions of the PCA. Additional, any domestic training provided must comply with the Deputy Secretary of Defense policy on advanced training.

- d. Approval Authorities: CJCSI 3710.01.
 - (1) Non-Operational Support.
 - (a) That which does not involve the active participation of DoD personnel, to include the provision of equipment only, use of facilities, and formal schoolhouse training, is requested and approved in accordance with DoDD 5525.5 and implementing Service regulations, discussed above.
 - (2) Operational Support.
 - (a) The Secretary of Defense is the approval authority. The approval will typically be reflected in a CJCS-issued deployment order.
 - (b) SECDEF has delegated approval authority for certain missions to Combatant Commanders, with the ability for further delegation, but no lower than a flag officer. The delegation from SECDEF depends on the type of support provided, the number of personnel provided, and the length of the mission. See CJCSI 3710.01. Example: For certain missions along the southwest border, the delegation runs from SECDEF to NORTHCOM to Joint Task Force SIX (JTF-6). (**Note:** as of now, current studies are considering whether to stand down JTF-6 as a standing task force.)
- e. Requests for DoD support must meet the following criteria:
 - (1) Support requested has clear counterdrug connection,
 - (2) Support request must originate with federal, state or local agency having counterdrug responsibilities,
 - (3) Request must be for support DoD authorized to provide,

- (4) Support must clearly assist with counterdrug activities of agency,
- (5) Support is consistent with DoD support of the National Drug Control Strategy,
 - (a) DEP&S Priorities for the provision of support:
 - (i) Multi-jurisdictional, multi-agency task forces that are in a high intensity drug trafficking area (HIDTA)
 - (ii) Individual agencies in a HIDTA
 - (iii) Multi-jurisdictional, multi-agency task forces not in a HIDTA.
 - (iv) Individual agencies not in a HIDTA
- (6) All approved CD operational support must have military training value.

3. Other Statutes.

- a. Section 1206, FY 90 NDAA. Congress directed the armed forces, to the maximum extent practicable, to conduct training exercises in declared drug interdiction areas.
- b. Section 1031, FY 97 NDAA. Congress authorized, and provided additional funding specifically for, enhanced support to Mexico. The support involves the transfer of certain non-lethal specialized equipment such as communication, radar, navigation, and photo equipment.

- c. Section 1033, FY 97 NDAA. Congress authorized, and provided additional funding specifically for, enhanced support to Colombia and Peru. The additional support is similar that provided to Mexico under Section 1031, but also includes boats suitable for riverine operations.

IX. MISCELLANEOUS SUPPORT

A. Sensitive support: DoDDS-5210.36

B. Law Enforcement Detachments

1. Law: 10 U.S.C. § 379.
2. U.S. Coast Guard personnel shall be assigned to naval vessels operating in drug interdiction areas. Such personnel have law enforcement powers, and are known as Law Enforcement Detachments (LEDET's).
3. When approaching a contact of interest, tactical control (TACON) of the vessel shifts to the Coast Guard. As a "constructive" Coast Guard vessel, the ship and its crew are permitted to participate in direct law enforcement. However, to the maximum extent possible, the law enforcement duties should be left to the Coast Guard personnel. Military members should offer necessary support.

C. Emergencies Involving Chemical or Biological Weapons

1. Law: 10 U.S.C. § 382.
2. In response to an emergency involving biological or chemical weapons of mass destruction, which is beyond the capabilities of the civil authorities to handle, the Attorney General may request DoD assistance directly.
3. The assistance provided includes monitoring, containing, disabling, and disposing of the weapon.
4. Regulations, required by the statute, implementing the authority, have not yet been promulgated.

D. Weapons of Mass Destruction

1. Defense Against Weapons of Mass Destruction Act (Nunn-Lugar-Domenici Act); Public Law 104-201.
2. Federal funding is provided to DoD to develop and maintain domestic terrorism rapid response teams to aid federal, state, and local officials and responders.
3. There are currently 37 response teams, composed of full time Army and Air National Guard members. These teams are federally resourced, trained, evaluated, and operating under federal doctrine. They perform their missions, however, primarily under the command and control of state governors. If the teams are federalized, they fall under the command and control of Joint Task Force, Civil Support (JTF-CS).

E. Miscellaneous Exceptions. DoDD 5525.5, Encl. 4, para. A.2.e. contains a list of statutes, which contain express authorization for the use of military forces to enforce the civil law. Among them are:

1. Protection of the President, Vice President, and other dignitaries.
2. Assistance in the case of crimes against members of Congress, foreign officials, or involving nuclear materials